OMAR OTHMAN v. KULIM ADVANCED TECHNOLOGIES SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
[CIVIL APPEAL NO: K-02(A)-936-05-2017]
15 OCTOBER 2018

LABOUR LAW: *Employment – Termination – Employee terminated with salary and allowances in lieu of notice – Whether termination contractual right of employer provided under conditions of contract – Whether termination with just cause or excuse – Whether unlawful termination – Whether termination simpliciter – Employment Act 1955*

INDUSTRIAL COURT: *Award – Termination of employment – Employee terminated with salary and allowances in lieu of notice – Whether termination contractual right of employer provided under conditions of contract – Whether termination with just cause or excuse – Whether termination lawful – Whether termination simpliciter – Whether High Court correct in intervening and quashing award of Industrial Court – Industrial Relations Act 1967, s. 20*

The appellant was employed by the respondent before he was terminated, by way of a termination letter, with three months' salary and allowances *in lieu* of notice. The termination was not based on poor performance, misconduct, redundancy but, according to the respondent, it was based on a contractual right pursuant to the conditions of the contract. The appellant commenced an action against the respondent at the Industrial Court. The Industrial Court found that, *inter alia*, the respondent's act of terminating the appellant's appointment, merely by giving notice or paying *in lieu*, without just cause or excuse, was a form of unlawful termination. The respondent appealed against the decision of the Industrial Court at the High Court. The central argument before the High Court, as well as the Industrial Court, was related to the jurisprudence of 'termination *simpliciter*'. The High Court took the view that, on the facts, it was not a case of termination *simpliciter* and quashed the said decision. Hence, the present appeal.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Termination *simpliciter* is a concept of common law, not part of the industrial jurisprudence of Malaysia under the Industrial Relations Act 1967 ('the Act'). The concept may be relevant in limited circumstances under the Employment Act 1955. Termination *simpliciter* related to the absolute common law right of an employer to terminate the employee pursuant to the terms of the contract. This common law right has been arrested by virtue of s. 20 of the Act. Whether it was indeed a

termination *simpliciter* depends on the facts and evidence before the Industrial Court, notwithstanding the Industrial Court may not have been given proper or cogent reasons. The issue being related to facts and evidence, and that too in relation to a decision of the Industrial Court, the High Court ought not ordinarily intervene as it was not an appeal process. (paras 3, 4 & 6)

(2) The notice of termination impinged on s. 20 of the Act as well as settled principles enunciated by case laws. Whether termination takes place before the expiry of the term, it is incumbent on the employer to demonstrate that the dismissal is based on just cause and excuse. Otherwise, the termination is unlawful and could not stand. The order of the High Court was set aside and the award of the Industrial Court was reinstated. (paras 11 & 12)

Bahasa Malaysia *Headnotes*

Perayu bekerja untuk responden sebelum dipecat, melalui surat pemecatan, dengan gaji dan elaun tiga bulan sebagai ganti notis. Pemecatan tidak dibuat berdasarkan prestasi yang tidak memuaskan, salah laku, lebihan pekerja tetapi, menurut responden, ini adalah hak kontraktual berikutan syarat-syarat kontrak. Perayu memulakan satu tindakan terhadap responden di Mahkamah Perusahaan. Mahkamah Perusahaan mendapati, antara lain, tindakan responden memecat perayu, hanya dengan memberi notis atau membayar sebagai ganti, tanpa sebab atau alasan adil, ialah satu bentuk pemecatan tidak sah. Responden merayu terhadap keputusan Mahkamah Perusahaan di Mahkamah Tinggi. Hujahan utama di Mahkamah Tinggi, dan di Mahkamah Perusahaan, berkaitan jurisprudens 'pemecatan *simpliciter*'. Mahkamah Tinggi berpendapat, berdasarkan fakta, ini bukan kes pemecatan *simpliciter* dan membatalkan keputusan tersebut. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Pemecatan *simpliciter* ialah konsep common law, bukan sebahagian jurisprudens perusahaan Malaysia bawah Akta Perhubungan Perusahaan 1967 ('Akta'). Konsep ini mungkin relevan dalam hal-hal keadaan terhad bawah Akta Kerja 1955. Pemecatan *simpliciter* berkaitan hak mutlak, bawah common law, majikan untuk memecat pekerja bawah terma-terma kontrak. Hak *common law* ini disekat oleh s. 20 Akta. Sama ada pemecatan sememangnya pemecatan *simpliciter* bergantung pada fakta dan keterangan di Mahkamah Perusahaan, tanpa mengira Mahkamah Perusahaan mungkin tidak memberi alasan wajar atau meyakinkan. Isu tersebut, yang berkaitan fakta dan keterangan, dan ini juga berkaitan keputusan Mahkamah Perusahaan, kebiasaannya Mahkamah Tinggi tidak sepatutnya campur tangan kerana ini bukan proses rayuan.

(2) Notis pemecatan melanggar s. 20 Akta dan juga prinsip-prinsip tetap yang dinyatakan oleh kes-kes undang-undang. Sama ada pemecatan berlaku sebelum penamatan tempoh, majikan wajib menunjukkan pemecatan dibuat berdasarkan alasan dan sebab adil. Jika tidak, pemecatan tidak sah dan tidak boleh dikekalkan. Perintah Mahkamah Tinggi diketepikan dan award Mahkamah Perusahaan dihidupkan.

Case(s) referred to:

Bennett Subash Peter v. Bon Ton Sdn Bhd (Bon Ton Resort Langkawi) [2019] 4 CLJ 150 CA ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***

Goon Kwee Phoy v. J&P Coats (M) Sdn Bhd [1981] 1 LNS 30 FC ***(refd)***

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20

For the appellant - GL Ambrose & Aneera Chowdry; M/s Louis Ambrose Chambers

For the respondent - Siti Rafidah Abdul Raof & Nurfarhana Fadzil; M/s Aswandi Hashim & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Alor Setar No. 25-9-9-2016 (overruled).]

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant (employee) appeals against the decision of the High Court which had quashed the decision of the Industrial Court.

[2] The central argument before the High Court as well as the Industrial Court was related to the jurisprudence of 'termination *simpliciter*'. The memorandum of appeal reads as follows:

> 1. The learned Judicial Commissioner erred in law and/or in fact in finding that the Industrial Court had acted irrationally and/or unreasonably in a *Wednesbury* sense and/or illegally and/or with procedural impropriety in arriving at its decision.
>
> 2. The learned Judicial Commissioner erred in law and/or in fact when his Lordship disturbed and/or interfered with the Industrial Court's findings of law and/or fact which found that the Respondent had unlawfully terminated the Appellant's employment.
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> 3. The learned Judicial Commissioner erred in law and/or in fact when His Lordship disturbed and/or interfered with the Industrial Court's findings of law and/or fact which found that there was termination *simpliciter*.

4. The learned Judicial Commissioner erred in law and/or in fact by failing to find, or failing to uphold the Industrial Court's finding that, terminating the Appellant's employment merely by giving notice, or paying *in lieu* thereof, without just cause or excuse, is a form of unlawful termination.

5. The learned Judicial Commissioner erred in law and/or in fact by:

5.1 incorrectly taking into account the Respondent's purported grounds in making the Application for Judicial Review in the High Court, including the Respondent's purported argument that the termination was justified:

5.1.1 as the Respondent had provided the Appellant contractual payment *in lieu* of notice of termination of employment; and/ or

5.1.2 as there was a change of state government in Kedah.

5.2 incorrectly applying, or failing to apply, trite principles of law, including:

5:2.1 the laws in respect of when a decision of the Industrial Court is open to judicial review;

5.2.2 the laws in respect of termination of employment and/ or termination *simpliciter*,

5.2.3 the laws in respect of fixed-term and permanent employment; and/or

5.2.4 principles and limitations of pleadings.

6. The learned Judicial Commissioner erred in law and/or in fact when His Lordship failed to appreciate that the Industrial Court had properly applied the facts and law in discharging its duty and discretion in finding that:

6.1 there was unlawful termination of the Appellant's employment; and

6.2 the Appellant was entitled to compensation for the same.

7. The learned Judicial Commissioner erred in law and/or in fact by failing to appreciate that the Appellant was entitled to the sum awarded by the Industrial Court in its discretion, if not more.

8. The learned Judicial Commissioner erred in law and/or in fact by failing to appreciate that there were apparent and/or serious irregularities with the Respondent's Application for Leave for Judicial Review and/or in the Application for Judicial Review.

Preliminaries

[3] It is now well-established that 'termination *simpliciter*' a concept of common law is not part of industrial jurisprudence of Malaysia - under the s. 20 of the Industrial Relations Act 1967 (IRA 1967). The concept may be relevant in limited circumstances under the Employment Act 1955.

[4] Termination *simpliciter* relates to the absolute common law right of an employer to terminate the employee pursuant to the terms of the contract. This common law right has been arrested by virtue of s. 20 of IRA 1967 which reads as follows:

> 20. (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

[5] It is also well-established that even in a 'probationary' period, termination must be anchored on the concept of just cause and excuse. In *Bennett Subash Peter v. Bon Ton Sdn Bhd (Bon Ton Resort Langkawi)* [2019] 4 CLJ 150; [2018] 6 AMR 225, the Court of Appeal had observed:

> [9] Whether it is a permanent employee or one on probation, industrial jurisprudence does not permit arbitrary reasons for dismissal. The reasons for dismissal must be *bona fide*. The *bona fide* test need not be objective. It all depends on the facts and circumstances of the case. An honest reason as well as mutual agreement may be sufficient. A mutual agreement of termination based on lack of *bona fide* may not suffice to say there was indeed a just cause and excuse for dismissal. Industrial jurisprudence generally leans towards the employee as opposed to the employer. This biasness is one related to common sense as the employer and employee are not often seen to have equal bargaining powers. In *Khaliah Abbas v. Pesaka Capital Corporation S/B* [1997] 3 CLJ 827, the Court of Appeal held:
>
> > [1] An employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of *bona fide* is thus essential in his dismissal. If the dismissal is found to be a colourable exercise of the power to dismiss or a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and set aside such dismissal.

[6] In the instant case, we found that the learned Judicial Commissioner took the view on the facts that it was not a case of termination *simpliciter* and thereby quashed the decision of the Industrial Court. The Industrial Court had found the case to be one of termination *simpliciter* and that the appellant had been unlawfully terminated. We take the view whether it was indeed a 'termination *simpliciter*' depends on the facts and evidence before the Industrial Court, notwithstanding the Industrial Court may not have given proper or cogent reasons. The issue being related to facts and evidence and that too in relation to a decision of the Industrial Court, the High Court ought not ordinarily intervene as it is not an appeal process.

A **Brief Facts**

[7] The appellant was employed by the respondent for a two year term from April 2011. The term was extended in March 2013. The appellant's salary and allowance amounted to RM14,000. By a termination letter dated 23 July 2013, the appellant was terminated effective the same day with three
B months' salary and allowances *in lieu* of notice. The said letter of termination reads as follows:

No. Rujukan: ktechno/corp/hr/olc/05

Tarikh: 23 Julai 2013

C Tuan Hj Omar bin Othman
B31, Jalan Sejati 3/1
Taman Sejati Indah
08000 Sungai Petani
Kedah

D Tuan,

PENAMATAN PERKHIDMATAN SEBAGAI KETUA PEGAWAI EKSEKUTIF KTPC TECHNOLOGIES SDN BHD (KTECHNO)

Saya dengan segala hormatnya ingin menarik perhatian tuan kepada perkara di atas.

E Mesyuarat Lembaga Pengarah KTECHNO yang bersidang pada tarikh 22 Julai 2013 memutuskan perkhidmatan tuan sebagai Ketua Pegawai Eksekutif ditamatkan berkuatkuasa pada tarikh 23 Julai 2013 sejajar dengan peruntukan dalam "Article 3, Part III, Conditions of Employment", Terma & Syarat Kontrak Perkhidmatan KTECHNO.

F Sehubungan dengan itu merujuk kepada "Article 3, Part 111, Conditions of Employment" tuan dibayar gaji ganti notis tiga (3) bulan dan akan dibayar dalam tempoh tujuh (7) hari daripada tarikh surat ini dikeluarkan.

Saya bagi pihak Lembaga Pengarah dan kakitangan KTECHNO mengucapkan terima kasih di atas sumbangan dan perkhidmatan tuan di
G KTECHNO.

Sekian.

Dengan hormatnya
KTPC TECHNOLOGIES SDN BHD

H (t/t)

DATO' HJ ABDUL RAHMAN BIN IBRAHIM, DSDK, AMK, BCK
Pengarah

Saya mengaku menerima surat dan memahami isi kandungannya.

I

Tandatangan (t/t)
Nama: Hj Omar bin Othman
Tarikh: 23-07-13

PAYMENT *IN LIEU* OF 3 MONTHS NOTICE

HJ OMAR BIN OTHMAN
KTPC TECHNOLOGIES SDN BHD

Basic Salary Allowance	11,000.00	
Petrol	500.00	
Transport	500.00	
Subsistence	2,000.00	
Housing	-	
Entertainment	-	
	14,000.00	
3 months salary *in lieu* of notice		42,000.00
Balance of annual leave as at 31 October 2013		
9 days		3,807.69
		45,807.69
Less: EPF Contribution		5,040.00
SOCSO Contribution		
PCB		
TOTAL AMOUNT TO BE PAID		40,767.69

Prepared by: Approved by:

(t/t)
Norizan bt Dollah Dato' Abdul Rahman bin Ibrahim

[8] The said art. 3 of the conditions of contract reads as follows:

ARTICLE 3 - TERMINATION OF SERVICES & RESIGNATION

The service of an employee may be terminated at any time by the Company without assigning any reason for willful breach of the terms and conditions of employment, committing criminal offenses, misconduct and indiscipline.

On resignation or termination of service, an employee shall surrender all documents, records, files, keys, vehicles (if any) and other assets belonging to the Company and settle all outstanding liabilities, loans and other obligations to the Company.

Executives

All executives intending to resign from the service of the Company are to give three (3) months notice in writing or pay three (3) months salary *in lieu* of notice.

A The company shall give similar notice or make similar payment *in lieu* of notice as indicated in paragraph 1 above if it wishes to terminate the service of an executive.

Non-Executives

B The period of notice for termination/resignation of employment shall be one (1) month notice or one (1) month salary *in lieu* of notice. The company shall give similar notice or make similar payment *in lieu* of notice as indicated in paragraph 1 above if it wishes to terminate the service of a non-executive.

[9] In essence, the employer's reason for termination was based on a C contractual right to terminate pursuant to 'art. 3'. The termination was not based on poor performance, misconduct, redundancy, etc. so as to demonstrate a *prima facie* case to terminate on just cause and excuse pursuant to s. 20 of IRA 1967.

[10] The respondent had argued and the learned Judicial Commissioner D had agreed that the appellant had not 'objected' to the termination and had in fact proceeded to accept the payment given *in lieu* of notice. We agreed with the appellant that in the law of industrial relations, pleas of estoppel, *res judicata*, acquiescence, waiver or laches, are regarded as technicalities which are passed over in favour of the substantive merits in the case and E where principles of equity and good conscience prevail. (See *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314).

[11] The notice of termination impinges on s. 20 of IRA 1967 as well as settled principles enunciated by case laws. Whether it is probationary period, F fixed term contract, etc. where termination takes place before the expiry of the term, etc; it was incumbent on the employer to demonstrate that the dismissal was based on just cause and excuse. Otherwise, the termination is unlawful and cannot stand. Support for the proposition is found in a number of cases. To name a few are as follows:

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(i) In *Goon Kwee Phoy v. J&P Coats (M) Sdn Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129, HRH Raja Azlah Shah CJ (as His Lordship then was) observed:

> We do not see any material difference between termination of the H contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for I the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been

made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

(ii) In *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304, the Federal Court *inter alia* held:

3. The Industrial Court in this case had come to a finding of fact that the motive for the termination of the services of the appellant was oblique and therefore it was justified in holding that the appellant had been dismissed without just cause or excuse.

[12] We took the view that this is not a fit and proper case for the learned Judicial Commissioner to have intervened in the decision of the Industrial Court. In consequence, we allowed the appeal and ordered the High Court order to be set aside and the Industrial Court award to be reinstated.

We hereby ordered so.